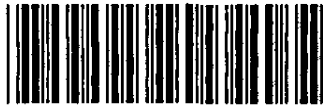


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3:99-CV-01516 MADDEN V. DELOITTE & TOUCHE

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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY

DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES MADDEN, MD., et al.,

Plaintiffs,

vs.

DELOITTE & TOUCHE, LLP, et al.,

Defendants.

CASE NO. 99cv1516-LAB (AJB)

**ORDER DENYING MOTION TO STAY  
ENFORCEMENT OF COSTS  
TAXATION PENDING APPEAL**

[Dkt No. 252]

This matter is before the Court on Plaintiffs' (collectively "the Madden plaintiffs") Motion To Confirm Automatic Stay Of Enforcement Of Bill Of Costs ("Motion") for the duration of appellate review in the United States Supreme Court. Dkt No. 252. The Madden plaintiffs' appeal to the Ninth Circuit was denied, and they represent they intend to file a petition for a writ of *certiorari* in the United States Supreme Court on or before their May 5, 2005 deadline. Defendant Deloitte & Touche ("Deloitte") filed Opposition, and Madden filed a Reply. The Court finds the issues appropriate for decision on the papers and without oral argument, pursuant to Civil Local Rule 7.1(d). For the reasons discussed below, the Motion is **DENIED**.

**I. BACKGROUND**

This action proceeded to judgment on a Consolidated Third Amended Complaint presented by the Madden plaintiffs and plaintiffs in a companion case (the Amin plaintiffs) in this securities action arising out of alleged misrepresentations related to a merger transaction. Partial settlements

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1 were reached with certain individual defendants and, as pertinent here, District Judge Thomas J.  
2 Whelan entered separate summary judgments in favor of Deloitte and of another entity, Volpe Brown  
3 Whelan & Company, LLC ("Volpe"). Dkt Nos. 167, 187.

4 A September 10, 2002 Order Settling Costs taxed \$20,306.19 in favor of prevailing party  
5 Volpe. Dkt No. 180. A November 27, 2002 Order Settling Costs taxed \$17,738.41 in favor of  
6 prevailing party Deloitte. Dkt No. 196. The Order referred the parties to Local Rule 54.1.h and Rule  
7 54(d) setting a deadline of five days after receipt of the notice of taxing costs within which any party  
8 could serve and file a motion to re-tax costs. The docket does not reflect any party did so.

9 The Madden plaintiffs and the Amin plaintiffs filed notices of appeal of the summary  
10 judgments, on November 14, 2002 and November 15, 2002, respectively (Dkt Nos. 193, 194), actions  
11 they contend automatically stayed the enforcement of the bills of costs. The Ninth Circuit affirmed  
12 the judgments in November 2004. A mandate issued, and a certified copy of the decree was received  
13 in the District Court February 22, 2005.

14 The Madden plaintiffs represent that Deloitte has now demanded payment of the costs bill.  
15 This Motion seeks a stay on grounds the Madden plaintiffs plan to appeal the Ninth Circuit decision  
16 to the United States Supreme Court. Mot. P&A 4:4-6; Borowsky Decl. ¶¶ 2-3. They seek an Order  
17 "confirming" the continuing "automatic stay" of enforcement of the bills of costs "and directing the  
18 Clerk of the Court not to issue any writ of execution for such costs, pending the disposition of  
19 Plaintiffs" writ petition. Mot. 11:24-2:1.

20 The Madden plaintiffs rely on FED.R.CIV.P. ("Rule") 62(f) and CAL. CODE CIV.P. §§ 916,  
21 917.1(d) for their contention they are entitled to an automatic stay of costs without bond because  
22 reversal would vacate the costs awards. Mot. 2:2-5. The Madden plaintiffs anticipate a "relatively  
23 short" further delay -- beyond the more than two years that have already elapsed since the costs were  
24 taxed -- if the Motion is granted of between six months (the time within which the high Court will  
25 likely decide whether to grant *certiorari*) and 15 months (should the high Court take the case).

26 Deloitte filed an Opposition to the Motion. Volpe did not respond to the Motion. Deloitte  
27 argues that notwithstanding the styling of the Motion as one to "Confirm Automatic Stay," under the  
28 federal rules, there is no "automatic" stay preventing its collection of costs the district court awarded.

1 Rather, they contend a "federal judgment debtor must assert a right to a stay by filing a proper motion  
2 in the district court." Opp. 1:7-10, *citing* Moore's Federal Practice - Civil § 62.05. Even if the Madden  
3 plaintiffs had timely filed such a motion, or if this Court were to construe the instant Motion as  
4 procedurally satisfying the motion requirement, Deloitte argues the Motion is also substantively  
5 defective. Deloitte contends reliance on Rule 62(f) as grounds for a stay is misplaced: "an order  
6 taxing costs is not a lien on real property in California, and is thus not subject to a stay under FRCP  
7 62(f)." Opp. 1:11-14. "Rule 62(f) clearly is inapplicable" because more than mere ministerial steps  
8 are required in California to convert a judgment into a lien. Opp. 2:20-21; 2:7-8.

9 The Madden plaintiffs reply they seek only "to preserve the status quo on the bills of costs until  
10 the parties complete appellate review of this complex securities action in the Supreme Court." Reply  
11 1:22-23. They do not dispute that California law requires certain affirmative steps be taken in order  
12 to convert a judgment into a lien. Rather, they characterize Deloitte as not having "cared enough about  
13 security for the costs to pay \$40 to file a lien." Reply 1:28-2:1. They further invoke not only Rule  
14 62(f), but also Rule 62(d), a discretionary provision authorizing the court to stay enforcement of costs  
15 in some circumstances. Reply 2:1-4.

## 16 **II. DISCUSSION**

17 District courts retain jurisdiction to address issues related to enforcement of supersedeas bonds,  
18 stays of execution, and to protect and enforce its judgments even after a notice of appeal has been filed.  
19 *See Sheldon v. Munford, Inc.*, 128 F.R.D. 663, 665 (N.D.Ind. 1989) ("[T]his Court has jurisdiction to  
20 regulate the collection proceedings including the enforcement of the supersedeas bond ... [despite the  
21 pending appeal]").

22 In the federal courts, enforcement of a judgment is automatically stayed for 10 days. Rule  
23 62(a). The losing party is expected to use that brief window to obtain a stay pending appeal if it so  
24 desires. If it does not do so, the prevailing party can execute on the judgment. The Court's final  
25 judgment in this case, filed October 21, 2003, expressly including the summary judgments previously  
26 ordered in favor of the Deloitte and Volpe entities. Dkt No. 232. The Clerk taxed costs in favor of  
27 those prevailing entity parties. No plaintiff appears to have sought a stay of the costs award pending  
28 the outcome of the Ninth Circuit appeals noticed on November 14 and 15, 2003.

1 In jurisdictions where a stay is not automatic upon the filing of a notice of appeal, a losing party  
2 must normally obtain court approval for a stay. See Rule 62(a), (d). Rule 62(a) provides, in pertinent  
3 part: "Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be  
4 taken for its enforcement until the expiration of 10 days after its entry ...."<sup>1</sup> Any automatic stay in this  
5 case under the federal rules thus expired 10 days after entry of the costs judgment.

6 Rule 62(d) provides (emphasis added):

7 Stay Upon Appeal. When an appeal is taken *the appellant by giving*  
8 *a supersedeas bond may obtain a stay* subject to the exceptions  
9 contained in subdivision (a) of this rule. The bond may be given at or  
10 after the time of filing the notice of appeal or of procuring the order  
11 allowing the appeal, as the case may be. **The stay is effective when**  
12 **the supersedeas bond is approved by the court.**

13 The posting of a bond protects a prevailing party from the risk of a later uncollectible judgment  
14 and compensates that party for delay in the entry of final judgment. National Labor Relations Board  
15 v. Westphal, 859 F.2d 818 (9th Cir. 1988). The Madden plaintiffs appear to have taken no affirmative  
16 steps to obtain a stay through the bond process, the usual manner in which to preserve the *status quo*  
17 pending appeal, or otherwise to obtain a stay of defendants' right to enforce their costs award judgment  
18 for the duration of the appeals process.

19 An exception to the bond requirement is provided in Rule 62(f):

20 Stay According To State Law. In any state in which a judgment is a  
21 lien upon the property of the judgment debtor and in which the  
22 judgment debtor is entitled to a stay of execution, a judgment debtor is  
23 entitled, in the district court held therein, to such stay as would be  
24 accorded the judgment debtor had the action been maintained in the  
25 courts of that state.

26 Rule 62(f) is narrowly construed as applying only when the judgment is itself a lien, that is,  
27 when nothing more than ministerial acts are necessary to convert a judgment into a lien and the debtor  
28 would be entitled to a stay under state law. California is *not* such a state. See Aldasoro v. Kennerson,  
915 F.Supp.188, 190-91 (S.D.Cal. 1995).

California is not a state in which a judgment is automatically a lien  
upon the property of a judgment debtor. Rather, under California law  
a judgment creditor must record the judgment or an abstract thereof in  
order to transform a judgment into a lien on property.

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<sup>1</sup> The balance of subdivision (a) applies only to actions for an injunction, receivership, or letters patent.

1 Ribbens International, S.A. v. Transport International Pool, Inc., 40 F.Supp.2d 1141, 1143 n.2  
2 (C.D.Cal. 1999), *citing* Aldasoro, 915 F.Supp. 188.

3 Accordingly, Rule 62(d) appears to control the issues presented.<sup>2</sup> The Court has discretion to  
4 issue a stay "[w]here an appeal has been taken." Absent a supersedas bond, no stay as of right is  
5 provided in the Rules, and stay pending full exhaustion of all potential appellate fora is similarly not  
6 expressly provided. The Madden plaintiffs' Ninth Circuit appeal is concluded.

7 Although they rely on the Aldasoro court's description of the district court's discretion under  
8 Rule 62(d), the Madden plaintiffs contend that opinion "does not correctly interpret the California law  
9 that triggers the mandatory stay under FRCP 62(f)." Reply 3:18-19. They represent "[n]o published  
10 Ninth Circuit decision determines how Rule 62(f) [*i.e.* Stay According To State Law] applies to a  
11 district court in California," whereas purportedly "the weight of authority from other Circuits confirms  
12 that Rule 65(f) applies despite the necessity of minor procedures to perfect any lien that the judgment  
13 creates." Reply 4:5-7. This Court is not persuaded opinions from other circuits, applying the law of  
14 states other than California, should be adopted here. Moreover, this Court concurs with the reasoning  
15 of the Aldasoro court and adopts that rationale in deciding this Motion.<sup>3</sup> "A judgment is not a lien in  
16 California," until it is recorded as prescribed under California law. Aldasoro, 915 F.Supp. at 190,  
17 *citing* CAL. CODE CIV. PROC. § 697.310.

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19  
20 <sup>2</sup> Although Rule 62(d) recites a bond requirement, the Court has discretion to waive the bond in  
21 circumstances such as "where the [judgment debtor's] ability to pay is so plain that the cost of the bond  
22 would be a waste of money." Aldasoro, 915 F.Supp. at 191. There does not appear to be any issue  
23 of the Madden plaintiffs' ability to pay the awarded costs. They have offered to make immediate  
24 payment of Deloitte's costs if the Supreme Court denies their *certiorari* petition, a circumstance they  
contend warrants a discretionary waiver of bond. Reply 2:21-25; Borowsky Decl. ¶ 3, Ex. A. They  
contend Deloitte never even inquired about satisfaction of costs before 2005, let alone perfected a lien,  
supporting an inference of its confidence the Madden plaintiffs have the ability to pay the costs  
judgment.

25 <sup>3</sup> The Madden plaintiffs criticize the portion of the Aldasoro opinion interpreting California law, in  
26 partial reliance on Wellborn v. Wellborn, 55 Cal.App.2d 516, 520 (1942). However, the Court finds  
27 the Wellborn issues are distinguishable, among other things in that the facts involved a judgment  
28 decreeing a lien upon specific real property in a dissolution of marriage proceeding, and the question  
presented was whether execution could lie in the absence of personal liability, in reliance on different  
sections of the California Code of Civil Procedure than the Madden plaintiffs invoke here. *Id.* at 520,  
*citing* CAL. CODE CIV. PROC. § 697.310 : "(a) Except as otherwise provided by statute, a judgment  
lien on real property is created under this section by recording an abstract of a money judgment with  
the county recorder." CAL. CODE CIV. PROC. § 697.310(a).

1 The Madden plaintiffs also argue CAL. CODE CIV. P. §§ 916 and 917.1 purportedly "reflect  
2 *California's policy* judgment that the automatic stay on judgments solely for routine costs does not  
3 significantly prejudice litigants." Reply 3:9-11 (emphasis added). Irrespective of the purported lack  
4 of "significant prejudice" to these litigants of issuing the requested stay, the Court finds the issues  
5 presented do not sound in equity because they are covered by express provisions of enacted federal  
6 law. The Madden plaintiffs cite no authority corresponding to the procedural posture and facts of this  
7 case. Section 916 addresses the state rules for stays of proceedings in the trial court upon the judgment  
8 or order appealed from "or upon matters embraced therein or affected thereby" *at the time an appeal*  
9 *is perfected*. No perfected appeal is presently pending in this case. Moreover, state court procedures  
10 do not trump express provisions of the federal rules with respect federal judgments.

11 Similarly, the Madden plaintiffs do not demonstrate how section 917.1 of the California Code  
12 of Civil Procedure applies to their circumstances or alters the result. That section provides, in  
13 pertinent part (emphasis added):

14 (a) *Unless an undertaking is given*, the perfecting of an appeal **shall**  
15 **not stay enforcement of the judgment** or order in the trial court if the  
judgment or order is for any of the following:

16 (1) Money or the payment of money, whether  
17 consisting of a special fund or not, and whether payable  
by the appellant or another party to the action.

18 (2) **Costs awarded pursuant to Section 998** which  
19 otherwise would not have been awarded as costs  
pursuant to Section 1033.5.

20 (3) **Costs awarded pursuant to Section 1141.21**  
21 which otherwise would not have been awarded as costs  
pursuant to Section 1033.5,  
22 ...

23 (d) **Costs awarded by the trial court under Chapter 6,**  
24 **commencing with Section 1021) of Title 14 shall be included**  
25 **in the amount of the judgment or order for the purpose of**  
26 **applying paragraph (1) of subdivision (a) and subdivision (b).**  
***However, no undertaking shall be required pursuant to this***  
***section solely for costs awarded under Chapter 6***  
***(commencing with Section 1021) of Title 14.***

27 The costs at issue here were not "awarded pursuant to" any California law.

28 As in Aldasoro, this Court finds: "In view of the steps necessary to transform a judgment into  
a lien and the policy objectives underlying FED.R.CIV.P. 62," unless the judgment creditor takes further

1 actions, a judgment does not automatically constitute a lien. Aldasoro, 915 F.Supp. at 190-91. That  
2 court reasonably declined to distinguish between a costs-only judgment and other kinds of judgments.

3 Finally, plaintiff's argument that a costs-only judgment is  
4 somehow less deserving of security to the judgment creditor finds no  
5 support under federal law. Although it is true under California law, an  
6 appellant may obtain a stay of execution of a cost-only judgment  
7 without posting bond. ... the Federal Rules reflect no such policy. On  
8 the contrary, "Rule 62, taken in its entirety, indicates a policy against  
9 any unsecured stay of execution after the expiration of the time for  
10 filing a motion for new trial."

11 Aldasoro, 915 F.Supp. at 192-93, *quoting* Van Huss v. Landsberg, 262 F.Supp. 867, 869 (W.D.Mo.  
12 1967).

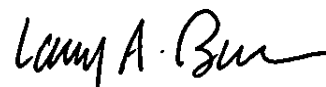
13 Although Volpe filed no opposition to the Madden plaintiffs' motion, and while Civil Local  
14 Rule 7.1.f.3.c authorizes the Court to construe silence as a consent to the granting of a Motion, the  
15 Court declines to do so in the posture of the case. The Court-approved costs forming the subject  
16 matter of this Motion, like the Volpe costs award, have already been entered as an enforceable Order  
17 with no perfected stay as provided under the federal rules.

### 18 **III. CONCLUSION AND ORDER**

19 For the foregoing reasons, **IT IS HEREBY ORDERED** the Madden plaintiffs' Motion to stay  
20 enforcement of the bill of costs is **DENIED**, as no "automatic stay" is in effect to be "confirmed."  
21 They shall be granted the FED.R.CIV.P. 62(a) 10-day stay of the execution of this Order from the date  
22 of its entry.

23 **IT IS SO ORDERED.**

24 DATED: 4-28-05



25 **HONORABLE LARRY ALAN BURNS**  
26 United States District Judge

27 cc: **MAGISTRATE JUDGE ANTHONY J. BATTAGLIA**  
28 **ALL COUNSEL OF RECORD**